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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1744

JULIUS E. FOSTER,

Petitioner,

v.

MAGNETIC HEATING CORPORATION, THERMATOOL CORPORATION, DAVID G. OSTERER, HERMAN C. MORRIS, AMERICAN MACHINE & FOUNDRY COMPANY,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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There is nothing about this patent case which warrants review by this Court.

The decision of the Court of Appeals for the Second Circuit, awarding petitioner $344,000 in damages for respondents' infringement of petitioner's patent and providing him with a royalty-bearing license until the April 14, 1976, expiration date of his patent in lieu of injunctive relief is manifestly right. There is no conflict of decisions. There is no unsettled question of Federal law or any constitutional issue raised by the petition. No question of public importance is involved. There has been no departure from the accepted and usual course of judicial proceedings. In short, there is no special or important reason for granting a writ of certiorari in this case.

Petitioner, like many litigants, believes that he should have been compensated more handsomely than he was. His contentions were carefully considered by a fully qualified

Special Master, an experienced District Court, and a competent Court of Appeals. No further review of his contentions should be undertaken by this Court.

Opinions Below

The opinion of the Court of Appeals for the Second Circuit is reported at 492 F. 2d 1317. That opinion is printed in petitioner's Appendix. Two opinions of the District Court, which are relevant here, are not reported. Neither is printed in petitioner's Appendix. Both appear as an Appendix to this brief.

Questions Presented

Petitioner's three "Questions Presented" do not state accurately the issues which petitioner would bring before this Court on certiorari.

The sole questions presented by this petition are:

> (1) Whether or not petitioner was adequately compensated, on the basis of established doctrines relating to reasonable royalty determinations, for infringement of his patent;
>
> (2) Whether or not denying petitioner injunctive relief and assuring him of royalty income for the future was, in the particular circumstances of this case, a sound exercise of equitable jurisdiction.

The ultimate issue is whether or not petitioner is entitled in this Court to another hearing with respect to the amount and the nature of the relief awarded to him because of infringement of his patent by respondents. But, as stated in *Magnum Co.* v. *Coty*, 262 U. S. 159, 163 (1923):

> "The jurisdiction [to bring up cases by certiorari] was not conferred upon this Court merely to give the defeated party in the Circuit Court of Appeals another hearing."

Constitution and Statutes

Article 1, Section 8, Clause 8, and Amendment V, of the Constitution cited in the petition at page 3, have no application here.

On the question raised with respect to injunctive relief, the statutory provision, not referred to by petitioner, is 35 U. S. C. § 283:

> "The several Courts having jurisdiction of cases under this title *may* grant injunctions in accordance with the principles of equity to prevent the violation of any right secured by the patent, on such terms as the Court deems reasonable." (Emphasis added.)

On the question raised with respect to the amount of damages, 35 U. S. C. § 102, quoted by petitioner, is not involved.

Statement of the Case

In this action for infringement of Foster patent No. 2,882,384, entitled "Welding System," Foster was awarded $344,000 in damages, and, in lieu of injunctive relief against them, respondents were granted a four year royalty-bearing license.

The Foster patent in suit, adjudicated to be valid and infringed by defendants-respondents,* relates to electrical welding of tubes and pipes. Tubes and pipes have been fabricated for many years by forming a flat strip of metal into a tubular shape and welding the edges together continuously in a longitudinal direction. This is, very broadly speaking,

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* Defense of the action has been conducted by American Machine & Foundry Company (now AMF Incorporated), the real party in interest, as a result of its acquisition of defendants Magnetic Heating Corporation and Thermatool Corporation. Respondents are referred to herein collectively as AMF (which includes AMF-Thermatool, Inc., a wholly-owned subsidiary of AMF) or as Thermatool.

the field of engineering to which this case relates. The Foster patent describes an improvement in low frequency electrical welding, one of several highly competitive systems for longitudinal welding of pipes and tubes. The key feature of the patent is the use of electromagnets, positioned in the vicinity of the welding zone, to control the path of the welding current (492 F. 2d 1319). Foster's electromagnets have never been used in low frequency electrical welding systems (492 F. 2d 1323). In fact, Foster has never manufactured welding equipment of any kind, including the equipment shown and described in his patent, and, until final judgment was entered in this case, has never had any licensees under his patent.

AMF has never manufactured or sold any low frequency electrical resistance welding systems of the kind described in the Foster patent (492 F. 2d 1320). Its adjudicated infringing activities have consisted of the manufacture and sale of equipment for high frequency electrical contact resistance welding of pipe and tube. This equipment was developed independently by AMF, before Foster's patent had issued and before AMF and its predecessors had even heard about Foster or his prospective patent rights. "Impeders," held in the adjudication on the merits of Foster's patent infringement action to correspond in function to the electromagnets of Foster's patent, are used in some, but not all, of AMF's high frequency contact resistance longitudinal welding equipments. Only those AMF contact resistance welding equipments which include impeders, and the use of such equipments for welding pipe and tube, constitute infringement of Foster's patent (492 F. 2d. 1320).

Petitioner's suit against respondents was commenced on April 14, 1965. On August 23, 1968, the District Court (Palmieri, J.) entered Findings of Fact and Conclusions of Law in favor of Foster on the issues of patent validity and

infringement (9a-16a,* 297 F. Supp. 512). The Court of Appeals for the Second Circuit affirmed *per curiam* (17a-18a, 410 F. 2d 12), and this Court denied certiorari (19a, 396 U. S. 829). The District Court referred the case to a Special Master (Dana Raymond, Esq., a partner in a prominent New York law firm specializing in patent matters) "to take and report account of the damages sustained by plaintiff by reason of said infringement." The accounting proceeded before the Special Master for a period of approximately forty months. Twelve hearings were held, over three hundred thousand pages of documents were produced by AMF, and testimony of ten different witnesses was heard by the Special Master. The Special Master submitted his Final Report, including extensive and detailed separate findings of fact (28a-117a), to District Judge Palmieri on September 22, 1972.

After considering extensive written submissions, the District Court heard oral argument and delivered a tentative opinion (App. 4b-18b) from the bench, in which he confirmed in all respects the Special Master's Report.

On February 8, 1973 the District Court, after "[c]onsideration of the briefs submitted [after the December 20 hearing] by the parties," decided that the supplemental briefs did not alter the Court's tentative opinion insofar as it concerned the Special Master's Report (Pet. 30). Judge Palmieri then entered Final Judgment After Accounting (Pet. 34-37).

On February 21, 1974, the United States Court of Appeals for the Second Circuit concluded, in a careful opinion, that Judge Palmieri and the Special Master were correct.

In initially fixing petitioner's award of damages, the Special Master (65a) applied the willing licensor-willing

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* In this brief, citations to pages followed by an "a" refer to the Joint Appendix in the Court of Appeals; citations to "Pet." followed by pages refer to Foster's petition. The Appendix to this brief is cited as "App."

licensee approach to hypothetical negotiations, presumed to have been conducted in 1959-1961 between Foster, as a willing licensor, and AMF, as "a willing licensee who would respect the Foster patent." Based on this approach and analysis, fully developed and sanctioned in *Georgia-Pacific Corp.* v. *U. S. Plywood-Champion Papers Inc.*, 446 F. 2d 295 (2 Cir. 1971), cert. denied 404 U. S. 870 (1971), the Special Master concluded that the "parties would have agreed upon a royalty measured by the output power of Thermatool's equipment adapted for use of the Foster impeder process" of $20 per kilowatt of rated output power of Thermatool's welding equipment, "such royalty to be paid for a license to Thermatool to continue its manufacture and sale of the equipment and for a license to Thermatool's customers to use the equipment" (66a). The District Court agreed. So did the Court of Appeals.

Petitioner, relying on his *ipse dixit* that the decision below represents an "usurpation of power by one of the most prestigious courts of appeals of the land" (Pet. 13), does not even attempt to face up to the controlling facts on which the damage award based upon a reasonable royalty was solidly founded. These facts, established by competent evidence, show that the award based on $20 per kilowatt, which was characterized by the Master as "the utmost that can fairly be awarded" (69a) is, if anything, overly generous.* The cardinal facts found by and the rationale adopted by the Master, endorsed by the District Court, and affirmed by the Court of Appeals, included (App. 7b-8b):

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* Petitioner seeks a royalty of $52,000,000 from AMF's sale of 77 equipments, for which AMF received total revenues of $8,622,272. This suggested recovery, on a running royalty or throughput basis, is more than six times AMF's gross receipts on these equipments, the major and most expensive part of each of which is a high frequency power generator to which Foster contributed nothing.

"Two factors operate to limit plaintiff's damages:

> "(1) Pipe and tubing manufacturers customarily do not pay running royalties to the owners of welding process patents; and
>
> "(2) Plaintiff's patent represents a relatively small portion of the overall commercial value of Thermatool's high frequency welding system.
>
> "Since running royalties are not customary in the pipe and tubing industry, it is unlikely that any producer would have been willing to pay such royalties for the use of equipment that employed plaintiff's impeder.
>
> "In fact, as the Special Master observed, if a running royalty were forced on the pipe and tubing manufacturers they probably would have sought some other method of production that did not infringe on plaintiff's patent.
>
> "The Special Master concluded that plaintiff's impeder [the *sine qua non* of the Foster patent and of AMF's infringement] had a relatively small effect on the commercial value of defendants' high frequency welding system and that conclusion is supported by the following:
>
> > "First, new and improved systems have come into use that do not employ plaintiff's impeder;
> >
> > "Secondly, plaintiff's impeder is a supplement to Thermatool's high frequency welding system, not vice-versa; and
> >
> > "Thirdly, the principal influence on the commercial value of defendants' high frequency welding system has been the engineering advances built into the equipment by defendants themselves."

In addition, the Courts below pointed out that Foster had never manufactured, or had manufactured for him, any of the equipment described in his patent, and that he had been unsuccessful in seeking licenses under it. In these

circumstances, injunctive relief was denied and a royalty-bearing license to AMF was included as part of the relief granted in the final judgment.

Reasons For Denying the Writ

1. Injunctive Relief Was Properly Denied to Petitioner

The first of petitioner's "Questions Presented" suggests that the Courts below did not have power to deny injunctive relief to petitioner or to include, in fashioning the relief granted to petitioner, a royalty-bearing license under petitioner's patent. Petitioner's suggestions are without merit.

The statutory provision relating to injunctions in patent infringement suits is 35 U. S. C. § 283. The text of the statute is cast in permissive, rather than mandatory, terms:

> "The several Courts having jurisdiction of cases under this title *may* grant injunctions in accordance with the principles of equity to prevent the violation of any right secured by patent, on such terms as the Court deems reasonable." (Emphasis added)

Addressing itself to the question of injunctive relief, the very first thing that the Court of Appeals said was (492 F. 2d 1324):

> "An injunction to protect a patent against infringement, like any other injunction, is an equitable remedy to be determined by the circumstances. 35 U. S. C. § 283."

The Court then went on to hold, in the particular circumstances of the present case, that an injunction was not warranted.

The decision below denying injunctive relief was consistent with both the statutory language and with judicial

precedent. It has been long established that the issuance of an injunction in a patent infringement action decided favorably to plaintiff is not a matter of right but, as in the case of injunctions generally, is within the sound equitable discretion of the Court.

Thus, in *Nerney* v. *New York, N. H. & H. R. Co.*, 83 F. 2d 409, 410-411 (2 Cir. 1936), the Court of Appeals for the Second Circuit stated:

> "In *Di Giovanni* v. *Camden Fire Ins. Ass'n*, 296 U. S. 64, 71, 56 S. Ct. 1, 80 L. Ed. [47], the Court pointed out that a remedy in equity may be denied where it would inconvenience the defendant beyond the compensating convenience to the plaintiff. Cf. *Seaboard Air Line R. Co.* v. *Atlanta, B. & C. R. Co.*, 35 F. (2d), 609 (C. C. A. 5). An injunction in a patent case is not always granted as a matter of course, and the balance of convenience may dictate its denial. . . . Where it appears that a much greater injury will be done to the infringer than a benefit to the patentee, the Court may, within its equity power, grant an accounting only and deny injunctive relief. *American Safety Device Co.* v. *Kurland Chemical Co.*, 68 F. (2d) 734 (C. C. A. 2); *McCrary* v. *Pennsylvania Canal Co.*, 5 F. 367 (C. C. E. D. Pa.). And where, as in *Hoe* v. *Boston Daily Advertising Corporation*, 14 F. 914 (C. C. Mass.), it is recognized that the only real advantage to a plaintiff in granting the injunction would be to strengthen its position in negotiating a settlement, an injunction should not issue."

Other illustrative authorities in which injunctions have been denied in patent infringement actions are *City of Milwaukee* v. *Activated Sludge*, 69 F. 2d 577 (7 Cir. 1934), cert. denied 293 U. S. 576 (1934); *Electric Smelting & Aluminum Co.* v. *Carborundum Co.*, 189 Fed. 710 (W. D. Pa. 1900), reversed on other grounds, 203 Fed. 976 (3 Cir. 1913), cert. denied 231 U. S. 754 (1913); *Hoe* v. *Boston Daily Advertiser Corp'n.*, 14 Fed. 914 (D. Mass. 1883);

McCreary v. *Pennsylvania Canal Co.*, 5 Fed. 367 (E. D. Pa. 1880), affirmed 141 U. S. 459 (1891); *Dorsey Harvester Revolving Rake Co.* v. *Marsh*, 7 Fed. Cas. 939, No. 4,014 (E. D. Pa. 1873).

District Judge Palmieri on September 10, 1968, after hearing counsel on the question of whether or not an injunction should issue in connection with his adjudication on the merits, concluded that (App. 2b):

> "it would be unwise and improper to afford the plaintiff injunctive relief.
>
> "The balance of equities weighs very heavily in favor of the defendant in the light of the fact that the defendant is engaged in manufacturing a product and the plaintiff is not engaged in manufacturing any product. The grant of injunctive relief would constitute, in my opinion, an irreparable hardship to the defendant without any concomitant or justifiable benefit to the plaintiff who is seeking damages, and who is not seeking to protect a going business or the merchandising of a product."

In December, 1972, Judge Palmieri again considered the question of injunctive relief and concluded that none should be granted but, instead, that future sales should be accounted for by virtue of a judgment "consonant with the notion of a compulsory licensing agreement" (App. 14b). The Final Judgment After Accounting (Pet. 36-37) contained such provisions in Paragraphs 10, 11 and 12.

The Court of Appeals approved this result, stating (492 F. 2d 1324):

> "[an injunction] is not intended as a club to be wielded by a patentee to enhance his negotiating stance. See *Hoe* v. *Boston Daily Advertiser Corp.*, 14 F. 914 (C. C. Mass. 1883). Here, as the District Court noted, the appellee manufactures a product; the appellant does not. In the assessment of relative

> equities, the Court could properly conclude that to impose irreparable hardship on the infringer by injunction, without any concomitant benefit to the patentee, would be inequitable. *Nerney* v. *New York, N. H. & H. R. Co.*, 83 F. 2d 409, 410-411 (2 Cir. 1936); *American Safety Device Co.* v. *Kurland Chemical Co.*, 68 F. 2d 734 (2 Cir. 1934)."

The only authority relied on by petitioner in support of his contention that denial of injunctive relief is "in serious conflict with prior decisions of this Supreme Court and is contrary to the Constitution and the repeated expressions of Congress" (Pet. 8) is the *Paper Bag Patent Case*, 210 U. S. 405 (1908). This case does not support the conclusion which petitioner would draw from it. In the *Paper Bag Patent Case*, the patentee and one infringer were competitors in the marketplace. This Court decided, on the specific facts of that case, that the patentee's non-use of the patented invention served a legitimate business purpose which did not warrant depriving the patentee of injunctive relief (210 U. S. 428-429). The Court made it plain that its decision was limited to the specific facts before it, and it did not decide whether or not there were other situations in which "a court of equity might be justified in withholding relief by injunction" (210 U. S. 430).

The decisions cited *supra* make it plain that authorities, both before and since the *Paper Bag Patent Case*, have sanctioned denial of injunctive relief in appropriate factual contexts. The present case unquestionably falls into this category.

2. Providing Petitioner with Future Royalty Income by Granting a License to AMF Was an Appropriate Exercise of Equity Jurisdiction

The Foster patent's welding system has never been commercialized by Foster. He has never manufactured any welding equipment described in his patent, and his

own attempts to license others were fruitless. His first income from his patent and his first prospect for continuing income were created by the judgment to which the petition is addressed. It is against this background that the "compulsory license" question must be appraised.

Apposite to this aspect of the judgment are the remarks of the Court of Appeals for the Second Circuit in *Royal-McBee Corporation* v. *Smith-Corona Marchant, Inc.*, 295 F. 2d 1 (2 Cir. 1961). In approving denial of injunctive relief "upon the payment of a fair royalty for continued use of the device during the relatively short period remaining of the life of the patent," the Court stated

> "We find this flexible approach towards a difficult problem of balancing equities in patent litigation most desirable, and we think the remedy was fully warranted by the facts of this case." (295 F. 2d 6)

In fashioning and approving a decree which provided petitioner with future royalty income and provided respondents with a license to continue their commercial activities, the Courts below were doing nothing more than exercising the historical and salutary powers of courts of equity. As this Court pointed out in *Hecht Co.* v. *Bowles*, 321 U. S. 321, 329-330 (1944):

> "We are dealing here with the requirements of equity practice with a background of several hundred years of history. Only the other day we stated that 'An appeal to the equity jurisdiction conferred on federal district courts is an appeal to the sound discretion which guides the determinations of courts of equity.' *Meredith* v. *Winter Haven*, 320 U. S. 228, 235. The historic injunctive process was designed to deter, not to punish. The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it. The qualities of mercy

> and practicality have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims."

The provisions relating to injunctive relief and to future royalty payments in the Final Judgment After Accounting are equitable, just, and reasonable. An injunction would benefit petitioner nothing; AMF's continued manufacture and sale cannot make any inroads into petitioner's nonexistent market. The Court of Appeals pointed out (492 F. 2d 1324) that the District Court, by including these provisions in its judgment,

> "avoided ordering a cessation of business to the benefit of neither party by compensating appellant in the form of a compulsory license with royalties. This Court has approved such a 'flexible approach' in patent litigation. *Royal-McBee Corp.* v. *Smith-Corona Marchant, Inc.*, 295 F. 2d 1, 6 (2 Cir. 1961). Here the compulsory license is a benefit to the patentee who has been unable to prevail in his quest for injunctive relief."

The provisions of the final judgment providing that petitioner be compensated in the future at the rate judicially approved for the past are clearly an advantage, rather than a disadvantage, to petitioner. If AMF or its assignees do not continue to pay as provided in the judgment, petitioner has no other source of royalty income or prospective source of income. And if AMF does not comply with the judgment, petitioner has the peremptory remedy of contempt available to him, more effective and expeditious from his standpoint than a possible suit for breach of any future license agreement which might be entered into between petitioner and AMF.

The Courts below properly exercised their broad discretion as courts of equity in refusing injunctive relief and in providing petitioner with future royalty income. Petitioner

has advanced no persuasive reason why this exercise of sound and informed equitable jurisdiction should be reviewed by this Court.

3. The Lower Courts Gave Proper Weight to What Constitutes Infringing Use of Foster's Process and Apparatus Claims in Fixing and Awarding a Reasonable Royalty

Petitioner's basic position appears to be that the Courts below did not properly compensate him for the infringing use of his invention because they ignored that the Foster patent contained "use" as well as "apparatus" claims (Pet. 10-11). This position is unfounded. The Special Master, the District Court and the Court of Appeals all considered and gave weight to the fact that the Foster patent contained use (i.e., process or method) claims as well as apparatus claims (40a, 53a, 57a-58a, 64a, 66a). And, in making his award on a dollar-per-kilowatt basis, the Special Master expressly rejected AMF's fundamental argument that Foster's recovery should be limited to a specific portion of AMF's welding apparatus (63a-64a).*

Petitioner's second question states that the reasonable royalty awarded below was "based on the sale of a part only of a piece of *unpatented* apparatus and technology, and in substitution for the statutory mandate (35 U. S. C. § 284) of at least 'a reasonable royalty *for the use made of the invention*' as defined by the *patented* process claims" (Pet. 2) (emphasis in original). The reference to the award below being based on a part only of a piece of *unpatented* apparatus, an oft-repeated contention by petitioner (Pet. 6, 10, 12) is incomprehensible, at best, or mis-

* AMF contended unsuccessfully that royalties should be based on the sales price of the portion of its infringing equipment which contained the impeder, i.e., the weld head, which is a small part of the welding system sold by AMF. Application of this criterion would have resulted in damages in the order of $10,500. AMF did not press this point in the Court of Appeals.

leading, at worst. The Foster patent includes apparatus claims and also process or method claims. Both were fully taken into account below in fixing the damages awarded to petitioner. The royalty awarded below was based on a reasonable royalty determination which took into account the apparatus claims of Foster's patent, the process claims of Foster's patent, and the activities of AMF's customers in producing tube and pipe by the use of infringing equipment.

Petitioner strains to make much of the conceded facts that his patent has been held valid and infringed and that it includes "use" or method claims. The pertinent authorities make plain, however, that regardless of the broad language of a patentee's claim, his recovery must be limited to his specific contribution to the art. Illustrative are *Cincinnati Car Co.* v. *New York Rapid Transit Corp.*, 66 F. 2d 592 (2 Cir. 1933) and *Egry Register Co.* v. *Standard Register Co.*, 23 F. 2d 438, 440-441 (6 Cir. 1928).

With respect to both the apparatus claims and the method claims, it is clear that Foster's patent contributed to the prior art only the use of an impeder, and that an impeder had to be present to infringe either type of claims.

Petitioner's contention that his improvement invention is more than the use of an impeder in an otherwise old process is destroyed by AMF's prior art Park 2,794,108 patent. With respect to this patent, which antedates Foster, the Special Master found (39a):

> "Before the issuance of the Foster patent, Thermatool became the owner of Park patent No. 2,794,108, filed August 31, 1953, and issued May 28, 1957. The Park patent disclosed and claimed the process and system for high frequency contact resistance welding of longitudinal seamed tubing for which all of Thermatool's welding systems involved in this accounting have been designed."

Except for the use of an impeder, the entire Thermatool high frequency welding system, including the step of forming the sheet metal into tubing, is described in the Park patent. Foster's patented improvement in pipe and tube welding, to the extent that it has been used by AMF and its customers, comes down to the use of an impeder (492 F. 2d 1323).

Because petitioner has never manufactured or licensed his patented invention, or otherwise suffered damage to any business interest, his recovery must be "adequate to compensate for the infringement but in no event less than a reasonable royalty for the use made of the invention by the infringer" (35 U. S. C. § 284). The "reasonable royalty" concept was adopted by the Courts years ago in order to fix damages in the absence of an established royalty or to compensate a patentee unable to demonstrate any actual damage. *Russell Box Co.* v. *Grant Paper Box Co.*, 203 F. 2d 177 (1 Cir. 1953), cert. denied 346 U. S. 821 (1953); *Rockwood* v. *General Fire Extinguisher Co.*, 37 F. 2d 62, 66 (2 Cir. 1930). The amount of a reasonable royalty for the use of a patented invention does not change with the identity of the one who pays it—i.e., whether it be the manufacturer and seller of the equipment or the user of it.

In developing the reasonable royalty concept, the Courts have considered the factual setting of each individual case. In almost every case the reasonable royalty determination has been arrived at on the basis of a combination of factors, rather than on the basis of any single factor. In making this determination the Courts below adopted as their benchmark the willing licensor-willing licensee doctrine.

Among the factors taken into account below in applying the willing licensor-willing licensee doctrine, which by themselves proscribe any award of damages based on a running royalty measured by production, were that:

1. Producers of pipe and tubing did not pay running royalties to holders of welding process patents and therefore "Thermatool could not have sold its welding equipment in competition with other electric welding systems that were available to its customers if such a use royalty had been demanded" (66a); and

2. The portion of the commercial value of Thermatool's high frequency contact resistance welding system with impeders which is attributable to Foster's patent was relatively small (58a).

The Special Master properly concluded that there was no evidence upon which he could base a conclusion that the producers of pipe and tube would be willing to pay any "running royalty for use of the Foster impeder process" (59a-60a). He recognized that if a running royalty were forced on the pipe and tube mill operators "[be it] 3% of their production, or any fraction thereof" (60a), such operators would likely shift to a competing and non-infringing system that did not require payment of such royalties (66a).

In these circumstances, the Courts below were clearly correct in not basing a royalty on the volume of welded pipe and tube produced by mill operators, and in assessing damages instead upon "hypothetical negotiations in 1959-1961 between Foster, as a willing licensor, and Thermatool, as a willing licensee who would respect the Foster patent" (65a). As pointed out by the Court of Appeals (492 F. 2d 1321-1322):

> "the Master related the 'reasonable royalty' theory to hypothetical negotiations between Foster and Thermatool, rather than between Foster and the 69 mill operators. He also disposed of the theory that such negotiations with the mill operators would have produced a greater royalty. Support for such theory

would have to be found in a history evidencing willingness by the mill operators to pay a running, or throughput royalty, based on their production, for rights to the welding process. The Master found that the evidence was to the contrary, a finding confirmed by the District Court."

* * *

"If we treat the mill operator as the infringer, there is no substantial evidence that he would have agreed to any royalty for the use of the infringing impeder at the 'suppositious meeting.' * * * '. . . Since running royalties are not customary in the pipe and tubing industry, it is unlikely that any producer would have been willing to pay such royalties for the use of equipment that employed plaintiff's impeder.' We agree. The question was what a reasonable man would be willing to pay for the use of a part of the whole process. *Merrell Soule Co.* v. *Powdered Milk Co. of America,* 7 F. 2d 297, 299 (2 Cir. 1925).

* * *

"In practical terms, Foster had a patent which obviously required the manufacture of a piece of equipment to make it usable. Foster does not have any licensee who manufactures his patented apparatus or uses his patented process. The parameters of his patent embraced a component in a larger system which utilized his process. He did not have equipment to sell directly to the mill operators. He was hardly in a position to work out an agreement directly with the mill operators. His theoretical licensee, in the formulation of a license agreement, was the manufacturer of the welding equipment who could use his process. And it is precisely in hypothetical negotiation with that prospective licensee that the District Court fixed the reasonable royalty."

The decision below is soundly based on the facts and the law. Petitioner's contention that the analysis made below is wrong and that the Courts below should have awarded

him a throughput or running royalty of $52,000,000 does not warrant consideration by this Court.

4. Petitioner's Contentions with Respect to AMF's Inducement of Infringement Are Unsound

Petitioner contends that AMF's "inducement" of infringement under 35 U. S. C. § 271(b) somehow entitles him to ignore the usual tests for recovery and to qualify him for the extraordinary sum he seeks here based on a throughput or running royalty (Pet. 12-13). This contention is without support in either reason or authority.

In advancing this unfounded theory, petitioner ignores that the reasonable royalty awarded by the Courts below, which compensates him for AMF's manufacture and sale and its customers' use of the infringing equipments (64a, 66a), necessarily includes compensation for direct infringement of both the apparatus claims and the process claims of the Foster patent. It is well-settled doctrine that compensation for direct infringement on a "reasonable royalty" basis makes a patentee whole and constitutes full and complete recovery. This principle applies to petitioner. Petitioner has cited no authority, and we know of none, which suggests that in addition to compensating him for direct infringement, AMF should pay additionally for "contributions to" or "inducements of" this very same direct infringement.

The authorities undercut any basis for petitioner's contentions. A patentee who has been fully compensated for direct infringement cannot collect anything additional for contributory infringement. *Aro Mfg. Co.* v. *Convertible Top Co.*, 377 U. S. 476, 512 (1964). There is no basis in logic or in policy for the rule to be any different with respect to inducement. *Nordberg Mfg. Co.* v. *Jackson Vibrators, Inc.*, 153 USPQ 777, 783* (N. D. Ill. 1967), reversed on other grounds, 393 F. 2d 192 (7 Cir. 1968).

* Not reported in F. Supp.

The conclusions of the lower Courts based on these controlling legal doctrines are in accord with the business realities of this industry: when a manufacturer such as AMF sells welding equipment, it passes on to its customers the right to use the equipment for its intended use without the payment of any throughput or other additional royalty (66a). The reasonable royalty award below took fully into account this important factual background in considering the extent of AMF's total liability, as a manufacturer of infringing equipment as well as an inducer, in awarding damages to Foster.

5. There Is No Conflict of Decisions, and No Question of Public Importance Is Presented

No other suit has been brought on the Foster patent. Thus, there is no decision on the same matter in conflict with the decision of the Court of Appeals for the Second Circuit here sought to be reviewed.

This case is nothing more than a private patent controversy. The Foster welding patent is plainly not a patent of unusual public importance. Applicable here is the rule stated in *Keller* v. *Adams-Campbell Co.*, 264 U. S. 314, 319 (1924):

> "Such an ordinary patent case . . . this Court will not bring here by certiorari unless it be necessary to reconcile decisions of the Circuit Courts of Appeal on the same patent."

The record here does not present any substantial question of Federal law requiring resolution by this Court. The monetary award to Foster of $344,000 and the provision in the judgment of a license under the Foster patent* in lieu of injunctive relief are soundly based on the particular facts of this case and are in accord with the decisions of this Court.

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* Foster's patent expires on April 14, 1976.

Conclusion

The petition should be denied.

Respectfully submitted,

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June 17, 1974

APPENDIX

District Court Opinion, September 10, 1968

[169a] UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

65 Civil 1114

JULIUS E. FOSTER,

Plaintiff,

vs.

MAGNETIC HEATING CORPORATION, THERMATOOL CORPORATION, DAVID G. OSTERER, HERMAN C. MORRIS, AMERICAN MACHINE & FOUNDRY COMPANY,

Defendants.

Before: HON. EDMUND L. PALMIERI, District Judge.

New York, September 10, 1968;
4.45 o'clock p.m.

APPEARANCES:

ALEXANDER KAHAN, ESQ., Attorney for Plaintiff.
CHARLES H. WALKER, ESQ., Attorney for Defendants.

and

WILLIAM K. KERR, ESQ. and
HERBERT F. SCHWARTZ, ESQ., of Counsel.

[170a] The Court: After discussing the form of the judgment with counsel, I have concluded that notwithstanding the statement I made at the conclusion of my

opinion of August 23, 1968, that it would be unwise and improper to afford the plaintiff injunctive relief.

The balance of equities weighs very heavily in favor of the defendant in the light of the fact that the defendant is engaged in manufacturing a product and the plaintiff is not engaged in manufacturing any product. The grant of injunctive relief would constitute, in my opinion, an irreparable hardship to the defendant without any concomitant or justifiable benefit to the plaintiff who is seeking damages, and who is not seeking to protect a going business or the merchandising of a product.

Under the circumstances, therefore, this judgment, which I have just signed, provides that no injunction shall issue.

I have also named Dana Raymond, Esq., of 80 Broad Street, New York City, as Special Master to take and report an account of damages sustained by the plaintiff.

[171a] Subject to Mr. Raymond's examination of the papers and determining whether or not there is any conflict of interest, he has indicated his willingness to serve, and counsel present have indicated no objection to his designation.

Lastly, and perhaps most importantly, the plaintiff has sought to be protected against any dilatoriness on the part of the defendants in prosecuting the appeal. The defendants have indicated that they will definitely prosecute an appeal. The plaintiff is interested in seeing to it that this appeal be prosecuted according to the time lapses provided by the rules and without any extensions of time and without any dilatoriness.

I would like you, Mr. Walker, to give me on the record now the assurances you gave me a few minutes ago so that

the plaintiff can be assured there will be no dilatoriness in prosecuting the appeal.

Mr. Walker: Yes, your Honor, we will gladly undertake to take all of the steps necessary to carry out the appellate procedure within the times allowed by the rules for doing these things, [172a] and with safe margin as a protection against the necessity for asking for any extensions of time, which we will seek only in the event of some completely unanticipated and unavoidable emergency.

The Court: Is that agreeable, Mr. Kahan?

Mr. Kahan: That is agreeable, your Honor, with one further observation, that either the Court or I can make on the record, that the plaintiff has consented without question to the denial of the injunction. The plaintiff will not argue for the injunction in this proceeding, nor for a supersedeas bond.

The Court: You did not argue for it this afternoon, but you applied for it through your papers earlier. As of now, you have not objected to the defendants' request that there be no injunctive relief, nor have you objected to my statement that injunctive relief was not justified.

Mr. Kahan: I was ready to take the first part of your statement, your Honor, though I will not take the second.

The Court: Don't let me put words [173a] in your mouth. You have acquiesced in Mr. Walker's request that the judgment contain no provisions for injunctive relief, and we will leave it at that.

Mr. Kahan: That's right.

The Court: Gentlemen, here is the judgment which I have signed. As soon as you have conformed your copies, please give it to my clerk so it can be filed without delay.

Thank you, gentlemen.

District Court Opinion, December 20, 1972

[174a] UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

65 Civil 1114

JULIUS E. FOSTER,

Plaintiff,

vs.

MAGNETIC HEATING CORPORATION, et al.,

Defendants.

Before: HON. EDMUND L. PALMIERI, District Judge

New York, December 20, 1972
Room 2804—5:00 p.m.

APPEARANCES:

ROBERT RINES, ESQ.,
FRANKLIN R. WEISSBERG, ESQ., and
PAUL J. FOLEY, ESQ., Attorneys for Plaintiff

FISH & NEAVE, ESQS., Attorneys for Defendants,
WILLIAM K. KERR, ESQ.,
HERBERT F. SCHWARTZ, ESQ., and
RAYMOND C. MARIER, ESQ., of Counsel

ROGERS, HOGE & HILLS, ESQS., Attorneys for Defendants,
FRANK H. GORDON, ESQ., of Counsel

[175a] The Court: The stenographer is present and I will summarize very briefly what occurred this afternoon.

District Court Opinion, December 20, 1972

The hearing began shortly after 3 o'clock and it is now 5 minutes after 5 and I heard arguments from Mr. Robert Rines on behalf of plaintiff and from Mr. William K. Kerr on behalf of the defendants.

At the conclusion of argument I requested the Special Master to submit his bill for services which he did and I asked him whether he would represent that if he were sworn he would testify that the time sheets attached to his bill and which have been marked Court Exhibit 1 of this date in evidence, were kept in the regular course of business and whether they would be true and correct.

He said he would so swear.

This bill representing 624 hours of professional services was submitted as a bill for $50,000; the disbursements amounting to $381.11. The Special Master represented that his fee in his office to clients is normally based on $100 an hour and that this bill has been substantially reduced below that figure. The Special Master also represented that the prolonged and extensive discovery undertaken in this case was due in substantial part to the plaintiff's actions and he declined to apportion his hours with respect to any causative factors attributable to one party or the [176a] other and I am left with the duty of assessing the cost of this reference.

I will assess the cost of the reference to the extent of $40,381.11 as costs to the defendants and I will assess $10,000 of costs as to the plaintiff.

The plaintiff has made charges against the Special Master and against the defendants. I find these charges unpersuasive and insufficient to warrant either the disqualification of the Special Master or the setting aside of

his report. I consider them completely unpersuasive and insufficient to warrant imposition of sanctions on the defendants.

The claim of the plaintiff for the imposition of sanctions was made not once but many times during the proceedings before the Special Master and the Special Master has reported that he has declined to impose sanctions on the defendants. I agree with that disposition of the matter.

I decline to set aside his views with regard to that or with regard to his alleged disqualification. Plaintiff has been careful to explicitly avoid any charge of prejudice or bias on the part of the Special Master. I consider that the charges made by the plaintiff were made tardily and after the plaintiff knew or should have known [177a] of the alleged indirect connection with some background of this patent and I do not believe that his awaiting the result of the special reference and his making the charges now before me and tardily before the Special Master warrant taking of any action in that respect.

With respect to the essential solution reached by the Special Master I find that those conclusions were reached carefully and on the basis of valid and binding authority and that his conclusions were entirely reasonable in the premises.

This was not an easy case, reaching what should be a reasonable royalty when the plaintiff is an inventor not engaged in any business or commercial activity; it is a very difficult task.

The damages here could not be measured by any injury to any business interests of the plaintiff. Additionally, since no license was ever granted under the patent, there

was no previously negotiated royalty that could serve as a standard in the case and so the Special Master was left and indeed the Court is left with the crucial question as to what should be a reasonable royalty in the premises.

I will not review the background of the case to any extent; that has been done in the Special Master's [178a] report.

My findings and decision with respect to the validity and infringement is reported in 297 F. Supp. 512 and affirmed by the Second Circuit, 410 F. 2d 12.

I reached no conclusions with respect to the commercial value of the plaintiff's patent and I made no suggestions with respect to what a reasonable royalty should be. I left this to the labors of the Special Master and I find that his conclusions are entirely warranted.

The Special Master's determination of a reasonable royalty is based upon principles set down in Georgia-Pacific Corporation against U. S. Plywood-Champion Papers, a decision of the Second Circuit of very recent vintage, reported in 446 F. 2d 294, Second Circuit 1971; certiorari denied, 404 U. S. 870.

In order to determine what a reasonable royalty should be in this case, it was necessary to consider the probable outcome of hypothetical negotiations between plaintiff inventor and the defendant infringers a short time after the issuance of the plaintiff's patent. In this regard, it was assumed and properly so, that the plaintiff would have been a willing licensor and the defendants willing licensees.

[179a] Two factors operate to limit plaintiff's damages:

(1) Pipe and tubing manufacturers customarily do not pay running royalties to the owners of welding process patents; and

(2) Plaintiff's patent represents a relatively small portion of the overall commercial value of Thermatool's high frequency welding system.

Since running royalties are not customary in the pipe and tubing industry, it is unlikely that any producer would have been willing to pay such royalties for the use of equipment that employed plaintiff's impeder.

In fact, as the Special Master observed, if a running royalty were forced on the pipe and tubing manufacturers they probably would have sought some other method of production that did not infringe on plaintiff's patent.

The Special Master concluded that plaintiff's impeder had a relatively small effect on the commercial value of defendant's high frequency welding system and that conclusion is supported by the following:

. First, new and improved systems have come into use that do not employ plaintiff's impeder;

Secondly, plaintiff's impeder is a supplement to Thermatool's high frequency welding system, not vice-versa; and

[180a] Thirdly, the principal influence on the commercial value of defendants' high frequency welding system has been the engineering advances built into the equipment by defendents themselves.

During the period 1959 through 1961 Thermatool placed a substantial value on its welding technology and

this technology when licensed to its customers was valued at as much as $200 per kilowatt of the rated output power of the generators used.

Starting in 1954 and prior to the issuance of plaintiff's patent, Thermatool included a charge of about $200 per kilowatt of rated output power in determining the selling price for its high frequency generators and related welding equipment. This amount represented compensation for the use of Thermatool's welding technology and for related services.

Later, in 1964, Thermatool entered a license agreement with the Ohio Crankshaft Company which contained a warranty that Thermatool was then collecting a royalty from vendees under the Park and Rudd patents of $200 per kilowatt. The defendants suggested during the course of the proceedings before the Special Master that plaintiff's impeder did not improve the quality of the welding and I believe the Special Master properly rejected such [181a] suggestions. Clearly the findings of fact made by the Court following the trial are res judicata with respect to the subsequent proceedings between the parties. I hasten to add that the commercial value of plaintiff's impeder in relation to the overall commercial value of Thermatool's welding technology was left for the Special Master's determination in the first instance and was not determined by the court during the litigation.

At the time of the trial the only issues before the Court were the validity of plaintiff's patent and whether or not the patent had been infringed. Consequently, there was no evidence of any significance with respect to damages. The resolution of the validity and infringement issues did not depend in any way upon the relationship of the impeder

to the overall commercial value of Thermatool's high frequency welding system.

In any event, the Court did not decide that virtually the entire commercial value of Thermatool's high frequency welding system is attributable to plaintiff's impeder.

The plaintiff's impeder constitutes a minor but significant fraction of the total value of Thermatool's high frequency welding technology. It should be noted that plaintiff's impeder has been used only by Thermatool and [182a] its customers and since 1956 Thermatool has almost invariably equipped its welding systems with impeders if the systems were to be used for the manufacture of longitudinally welded pipe and tubing.

In addition, it has supplied its customers with a large number of replacement impeders.

Thermatool's high frequency welding process has been in commercial use both with and without impeders. However, the Foster impeder process has been used commercially in this country only in conjunction with the Thermatool process.

Other factors have also contributed to the commercial value of the Thermatool high frequency welding system and these include:

> First, the fact that the system operates at a much higher frequency than contemplated in plaintiff's patent; and
>
> Second, the engineering advances incorporated into the system by Thermatool itself.

I reject plaintiff's claim that he is entitled to a 3 per cent running royalty as damages, which would total more

than $52 million. This figure appears to be in excess of Thermatool's revenues received for sale or lease of infringing equipment during the accounting period.

No evidence was introduced showing that producers [183a] of welded pipe and tubing had paid running royalties on production for the use of any welding process. Nor is there any evidence that had they been willing to pay such a royalty it would have been 3 per cent.

Moreover, the plaintiff is not entitled to royalties on systems sold outside the United States. The use of plaintiff's process in a foreign country does not infringe his patent. The fact that the sale of the equipment was consummated in this country is immaterial. What is important is that the systems sold to foreign purchasers were not assembled until the various components reached their ultimate destination. Only when a complete system is assembled can there be infringement.

I reject the plaintiff's claim that he should be entitled to a royalty of $200 per kilowatt on infringing systems used in this country as to which production figures are not available.

Such a demand I consider to be excessive. Such a royalty would equal or exceed the total profit earned by Thermatool on sales of its infringing systems.

And, furthermore, in making this ridiculous demand, plaintiff ignores the fact that the development and marketing of the Thermatool high frequency welding system did not result solely from his own inventive talents.

[184a] I reject the plaintiff's claim that he should be awarded 20 per cent of Thermatool's sales of spare and

replacement parts. There is no persuasive evidence to establish how much profit was earned by Thermatool on such sales. In addition, any royalty on spare and replacement parts would be arbitrary and therefore improper.

Plaintiff's additional claim for $250,000 is likewise without merit. Plaintiff claims that an aggregate of $250,000 was paid to Thermatool by various other firms for licenses under the Rudd patent, a patent which is dominated by plaintiff's patent. The facts do not support this claim.

Reynolds Metals Company paid $50,000 to Thermatool, but not as a royalty. The payment was made as consideration for a release from a sales agency agreement. Bethlehem Steel Corporation was to pay $100,000 for a license to use another Thermatool process that does not involve impeders, but that transaction failed to reach completion. As to the $100,000 payment made by Ohio Crankshaft Company upon execution of a settlement agreement dated February 28, 1964, there is no evidence that such payment had any connection with the Rudd patent.

The Special Master declined to make any findings [185a] with respect to punitive damages on the ground that he had not been instructed to make any. I decline to make any finding with respect to punitive damages other than to say that there isn't evidence to warrant my reaching any such conclusion and I decline explicitly to impose punitive damages upon the defendants.

The Special Master noted in his report that during the accounting defendants presented evidence with dispatch and candor. I accept his conclusion as fully warranted by the evidence.

District Court Opinion, December 20, 1972

I do not accept the defendants' contention that a reasonable royalty should be based on the sales value of the weld head. The selling price of the components that any relation to the overall value of plaintiff's invention. The plaintiff devised a process that produced a higher quality weld than that produced by other methods, and in less time. And thus the value of plaintiff's process should be measured by its contribution to the art of welding and not by the selling price of the components.

I reject the defendants' contention that plaintiff's 1966 settlement offer of $165,000 should set a ceiling on the recovery. The offer was made prior to the plaintiff undertaking the risk and expense of litigation [186a] and, like all settlement negotiations, I think it should be disregarded now that litigation has been undertaken and completed after all these many long, difficult years.

The Special Master found and I agreed the outcome of the hypothetical negotiations would have been as follows:

One, that the parties would have agreed on a royalty based on the output power of infringing welding equipment.

Two, that the parties might have agreed that the plaintiff would share in any running royalties that might be collected. But since no such royalties ever were received by defendants, further discussion of this point is unnecessary.

Three, that the parties would have agreed that no royalty would be payable on sales of welding equipment to foreign users.

Four, that the parties would have agreed that no royalty would be payable with respect to infringing equipment sold

prior to the issuance of plaintiff's patent. Plaintiff benefited from such sales because they established a market for his product prior to the issuance of his patent.

Five, that the parties would have agreed that no royalties would be payable with respect to Thermatool's [187a] sales of spare and replacement parts.

Six, that the parties would have agreed on a royalty at a rate of $20 per kilowatt on all infringing equipment sold for use in the United States after April 14, 1959. This royalty amounts to about 3 per cent of the revenue generated by sales of such equipment. This royalty might appear excessive considering the fact that (a) a large part of the sale price of the welding system was attributable to the high frequency generator, which has nothing to do with plaintiff's patent; and (b) Thermatool had discovered the value of impeders and put them into use before plaintiff's patent was issued. However, it must be kept in mind that welding technology is more important to defendants' business than high frequency generators. It seems logical to conclude that defendants would pay a $20 per kilowatt royalty for the right to continue marketing what had already proven itself to be a successful product.

With respect to future sales I invite the parties to submit a form of judgment consistent with what has already been said in language consonant with the notion of a compulsory licensing agreement.

Mr. Rines has represented to the Court that he [188a] has a contingency fee arrangement of 20 per cent of recovery; Mr. Foley has represented to the Court that he has a separate contingent fee arrangement of 20 per cent of recovery; and Mr. Weissberg, speaking for Mr. Kahan,

has said that an amicable arrangement will be sought for the purpose of paying the fee due to Mr. Kahan.

Mr. Weissberg represented that he expects to receive nothing for his services because of his relationship to Mr. Foster, the inventor.

Accepting this representation at face value, I direct Messrs. Rines, Weissberg, Foley and Kahan to arrive at an amount for the payment of their respective fees which in toto will not exceed 30 per cent of the recovery in this case.

I regard the 20 per cent contingent fee arrangements of Messrs. Rines and Foley to be in excess of what equitable principle should allow and notwithstanding their long and patient and dedicated and indeed aggressive efforts in behalf of the inventor, I think it would not be consonant with my appropriate findings in the case to sign a judgment in which so much of the recovery should be paid out to attorneys for their fees.

I would suggest that a contingent recovery of 15 per cent for each one of Messrs. Rines and Foley would be [189a] sufficient, less whatever amount may be necessary to accommodate the fee of Mr. Kahan.

Mr. Weissberg: Your Honor, I would like to point out to you that the plaintiff in this case in addition to being an inventor is an attorney, a member of this bar for many years.

The Court: He is a patent solicitor.

Mr. Weissberg: I would like to point out I have been a member of the bar for some 15 years and Mr. Foster and

I are well acquainted with the value of attorney's services and fees; that Mr. Rines has been with this case more than five years and that he won a verdict against a claim that the case was nothing more than a nuisance settlement, that the hundreds and hundreds of hours devoted to this case by Messrs. Rines and Foley are self-evident by the fact, your Honor, that the Special Master who has been in only part of this case, has amassed 624 hours and I would suggest to you that on any kind of time basis the value of services of the two attorneys in question would be way up in the hundreds of thousands of dollars and I suggest that you permit Mr. Foster, before you come to any final conclusion with respect to fees, to submit an affidavit giving the Court his views.

The Court: I will not object to his submitting [190a] an affidavit giving his views. In fact, I am giving you the benefit of my views at this time so as to permit you and in fact I invite you and your adversaries to submit any comments or suggestions you may wish which you believe should change any of these and you may do it with respect to fees.

I doubt that I will change my view but I don't want to shut the door. I have previously told you that these views must be deemed to be my tentative decision subject only to whatever modification I may make after considering and studying the submission I asked you to make by January 22, 1973.

My only view is that the hours amassed by the Special Master were amassed because of the undue and unnecessary prolongation of these proceedings by unduly extensive and peripheral discovery in this case and that there has been an unduly aggressive and zealous attempt to enlarge this recovery beyond any possible justification.

I regard the demand for the recovery of $52 million and the suggested recovery of $26 million made in behalf of plaintiff as being utterly unreasonable and excessive. However, I don't want to shut the door to any suggestions that Mr. Foster who I know to be a patent solicitor, may wish to make.

[191a] My direction to these attorneys subject to any changes I may hereafter make will stand. Their total fees may be divided among them but they shall not exceed 30 percent of the recovery. If they are unable to agree to a proper division I will have to make the division myself. I have made a suggestion as to how the division should be made.

I don't think, since the question of future damages will be covered I hope by appropriate language in the proposed judgment consistent with the notion of a compulsory license, I don't think I need to make any special provision with respect to injunctive relief.

The recovery will carry with it a 6 per cent interest charge from the date of the filing of the Special Master's report and 7½ per cent interest charge from the date of the entry of the judgment.

Mr. Weissberg: Would your Honor clarify that, please? Are you saying that there will be no interest payment until the date of the Special Master's report?

The Court: There will be no interest payment until the date of the filing of the Special Master's report.

The clerk just handed the docket sheet which indicates the report of the Special Master with exhibits [192a] to the appendix was filed on September 22, 1972.

There will be no interest payable up to that time and the rate of interest payable after that time will be 6 per cent until the entry of judgment and, at that time, the interest rate will be 7½ per cent.

Off the record.

(Discussion off the record.)

The Court: Gentlemen, I regret this litigation lasted so long. I hope it will come to a conclusion in the near future. I intend to deal with it as expeditiously as possible after the 22nd of January and I appreciate your attending today.